U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF G-D- CORP.

DATE: MAY 3, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of prepaid debit cards and cash reload services, seeks to employ the Beneficiary as a financial analyst. It requests her classification as a member of the professions holding an advanced degree under the second-preference, immigrant classification. Immigration and Nationality Act section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based, "EB-2" category allows U.S. businesses to sponsor foreign nationals for lawful permanent resident status in positions requiring master's degrees, or bachelor's degrees and five years of experience.

After first granting the filing, the Director of the Nebraska Service Center revoked the petition's approval. The Director found the accompanying labor certification from the U.S. Department of Labor (DOL) invalid for the job opportunity. The Director also concluded that the record did not establish the Beneficiary's possession of the minimum experience required for the offered position.

On appeal, the Petitioner asserts itself as a successor in interest of the company that filed the labor certification application and contends that the Director erred in calculating the Beneficiary's qualifying experience.[1]

Upon *de novo* review, we will dismiss the appeal.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration generally follows a three-step process. First, an employer seeking to permanently employ a foreign national in the United States must obtain DOL certification of its job offer. *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). The DOL must determine whether the country has able, willing, qualified, and available workers for an offered position, and whether employment of a foreign national would hurt the wages and working conditions of U.S. workers with similar jobs. *Id.* If the DOL certifies a position, an employer must submit the certification with an immigrant visa petition to U.S. Citizenship and Immigration Services

[1] The Petitioner indicated on the Form I-290B, Notice of Appeal or Motion that it would submit a brief or additional evidence within 30 days of the appeal's filing. As of this decision's date, we have no record of receiving further submissions from the Petitioner.

(USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. If USCIS approves a petition, a foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

At any time before a beneficiary obtains lawful permanent residence, however, USCIS may revoke a petition's approval for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by the record, realization of a petition's erroneous approval may justify revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). USCIS properly issues a notice of intent to revoke if, as of its issuance, the unrebutted and unexplained record would have warranted the petition's denial based on insufficient evidence. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, revocation lies where the record, including any explanation or rebuttal evidence, would have merited the petition's denial. *Id.* at 451-52.

II. SUCCESSORSHIP IN INTEREST

Unless accompanied by an application for Schedule A designation or documentation of a beneficiary's qualifications for a shortage occupation, a petition for an advanced degree professional must include a valid, individual labor certification. 8 C.F.R. § 204.5(k)(4)(i). A labor certification remains valid only for the particular job opportunity stated on it. 20 C.F.R § 656.30(c)(2).

A business may use a labor certification filed by another employer only if it establishes itself as a successor in interest of that employer. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481, 482-83 (Comm'r 1986). A successor must demonstrate its acquisition of rights and obligations needed to operate a predecessor's business. A successor must: 1) document the transfer of all or a relevant part of the predecessor to it; 2) demonstrate that, but for the change in employer, the job opportunity remains the same as certified; and 3) establish eligibility for a petition's approval, including the continuous ability of it and the predecessor to pay the proffered wage. *Id.*

Here, the labor certification identifies the employer as a different company than the Petitioner. The Petitioner asserts that, after the labor certification's issuance and before the petition's filing, it acquired the labor certification employer and began operating its prepaid card management services. Specifically, the Petitioner claims that it acquired the labor certification employer's parent company and that both the labor certification employer and its parent are now non-functioning entities. As such, the Petitioner argues that a successor relationship exists between it and the labor certification employer.

Based on insufficient evidence of the Petitioner's acquisition of the labor certification employer, the Director properly issued the notice of intent to revoke (NOIR). A letter from the Petitioner and a copy of its 2015 annual report stated its acquisition that year of a company with a name similar to the labor certification employer's. As of the NOIR's issuance, however, the record neither explained the relationship between the labor certification employer and the acquired company, nor established the Petitioner's acquisition of the labor certification employer.

In response to the NOIR, the Petitioner submitted a letter from the former general counsel of the acquired company. The letter identifies the acquired company as the parent of the labor certification employer. The Petitioner also submitted copies of the acquired company's 2014 federal income tax returns, identifying the labor certification employer as its subsidiary. As of the revocation, the record therefore established the relationship between the labor certification employer and the acquired company.

For the reasons discussed below, however, the Petitioner did not establish its acquisition of the labor certification employer or its eligibility as a successor in interest. The record on appeal contains part of the Petitioner's acquisition "agreement and plan." The agreement indicates a merger between a wholly owned subsidiary of the Petitioner and the labor certification employer's parent company. According to the agreement, upon merging, the Petitioner's subsidiary would terminate, and the labor certification employer's parent company would survive as a wholly owned subsidiary of the Petitioner. The Petitioner also submitted copies of a signed certificate, indicating the merger's occurrence.

However, the evidence submitted is insufficient to establish the Petitioner as the successor in interest to the labor certification employer. The agreement and the certificate demonstrate the Petitioner's acquisition of the labor certification employer's parent company. But the agreement is missing pages and does not indicate what provisions were made concerning the subsidiaries of the merged companies, including the labor certification employer. Absent this information, the record does not document the transfer of all or part of the labor certification employer to the Petitioner, as required, nor does the record establish whether the Petitioner assumed rights and obligations needed to operate the labor certification employer's business. *See Matter of Dial Auto Repair*, 19 I&N Dec. at 482 (requiring a claimed successor "to fully explain the manner by which the petitioner took over the business" and to provide a copy of a contract or agreement between the entities).

Moreover, both the labor certification employer and its parent company appear to continue to exist. Although the Petitioner claims that these two entities became "non-functioning" after transferring their prepaid card management programs to the Petitioner in August 2015, the Petitioner has not submitted a copy of the agreement transferring these programs or otherwise provided evidence to corroborate the claims. If the labor certification employer continues to operate as a separate entity, although now a subsidiary of the Petitioner, the offered job opportunity would appear to remain with the labor certification employer. If the offered job remains with the labor certification employer, the Petitioner may not be considered a successor in interest in this petition.

Based on the foregoing discussion, we find that the record does not document the Petitioner's claimed successorship of the labor certification employer.

III. THE BENEFICIARY'S QUALIFYING EXPERIENCE

A petitioner must establish a beneficiary's possession of all DOL-certified job requirements by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). In evaluating a beneficiary's qualifications, USCIS must examine the job offer portion of a

labor certification to determine the minimum requirements of an offered position. USCIS may neither ignore a certification term, nor impose additional requirements. *See Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984) (holding that immigration authorities are "bound by the DOL's certification").

Here, the labor certification states the minimum requirements of the offered position of financial analyst as a master's degree and three years of experience in the job offered or in "[a]ny related occupation." On the certification, the Beneficiary attested to her possession, before the petition's priority date, of about three years and eight months of full-time qualifying experience, including about two years with the labor certification employer, and about two years and three months of part-time qualifying experience.

A labor certification employer may not rely on experience that a foreign national gained with it, unless the experience was in a substantially different position or the employer can demonstrate the impracticality of training a U.S. worker for the offered position. 20 C.F.R. § 656.17(i)(3). Here the Beneficiary's experience with the labor certification employer was in the job offered and therefore may not be considered qualifying experience. *See* 20 C.F.R. § 656.17(i)(5)(ii) (a substantially comparable position is one requiring performance of the same job duties more than 50 percent of the time.) Thus, the Director properly discounted the two years of full-time experience that the Beneficiary gained with the labor certification employer.

The Petitioner submitted letters documenting the Beneficiary's remaining experience, including: one year and eight months of full-time experience; and two years and three months of part-time experience. *See* 8 C.F.R. § 204.5(g)(1) (requiring a petitioner to support a beneficiary's claimed, qualifying experience with letters from employers). For labor certification purposes, however, part-time experience equals half the amount of full-time experience. *See Matter of Cable Television Labs, Inc.*, 2012-PER-00449, 2014 WL 5478115, *1 (BALCA Oct. 23, 2014) (finding 16 months of part-time experience equivalent to eight months of full-time experience). Thus, the Beneficiary's two years and three months of part-time experience equates to only about 14 months of full-time experience. Combined with her other one year and eight months of full-time experience, the record does not establish the Beneficiary's possession of the requisite three years of full-time employment experience.

On appeal, the Petitioner asserts that the record establishes the Beneficiary's qualifying experience. But the Petitioner does not explain how or provide additional evidence of the Beneficiary's qualifications. Thus, as the Director found, the record as of the petition's approval did not establish the Beneficiary's possession of the minimum experience required for the offered position.

IV. CONCLUSION

The record does not demonstrate the Petitioner's eligibility as a successor in interest of the labor certification employer. The record therefore did not establish the certification's validity for the offered position. The record also does not establish the Beneficiary's possession of the minimum experience required for the offered position. We will therefore affirm the Director's decision.

ORDER: The appeal is dismissed.

Cite as *Matter of G-D- Corp.*, ID# 1635249 (AAO May 3, 2018)